Arizona Supreme Court
Committee on Improving Judicial Oversight
and Processing of Probate Court Matters

Arizona State Courts Building
1501 West Washington Street, Phoenix, Arizona 85007
Hearing Room 109

Date: April 8, 2011
Time: 10:00 a.m. –2:00 p.m.

Regular Meeting Minutes

MEMBER ATTENDANCE:	
Present:	**Absent:**
Judge Ann Scott Timmer, Chair	Commissioner Julia Connors
Judge David Mackey	Judge Gary Donahoe
Judge Rosa Mroz	Faustina Dannenfelser
Judge Robert D. Myers	Denise Lundin-Newton
Judge Robert Carter Olson	
Diana Clark	
Thomas Davis	
Pamela Johnston	
Jay M. Polk	
Catherine Robbins	
Mark Salem	
Jacob Schmitt	
Denice Shepherd	
Sylvia Stevens	

Appearing Telephonically:	
Judge Charles Harrington	

AOC STAFF:	
Nancy Swetnam	Director, Certification and Licensing Division
Doris Leonard	Certification and Licensing Division

GUESTS:	
Carla Jones	Northern Arizona Fiduciaries
Ellen Terry	EVAR AIL

CALL TO ORDER..... Judge Ann A. Scott Timmer, Chair

Judge Timmer welcomed the committee members and members of the public.

UPDATE ON LEGISLATION

Judge Timmer reported that the floor amendment to House Bill 2424 has been completed and is going forward. Amy Love, who is the legislative liaison for the Administrative Office of the Courts, has offered to assist in drafting an amendment to SB 1499, thereby making the two bills identical. Judge Timmer noted that it is not known which bill will proceed, and Rep. Smith is shopping for a sponsor in the senate.

Regarding the status on HB 1081, Judge Timmer informed the committee that HB 1081 is awaiting its third read, which is the final procedure in the House before it's voted on, followed by transmittal to the governor.

REVIEW AND APPROVAL OF MINUTES

Regular Minutes for the March 25, 2011 meeting were approved as presented.

Motion: Judge Myers
Second: Judge Mackey
Approved

REPORTS FROM WORKGROUPS

Workgroup 3 – Fee Guidelines/Fee Awards and Fee Dispute Resolution
Judge Robert Carter Olson, Chair

Before turning the report over to Judge Olson, Judge Timmer reported that workgroup 3 has a number of proposed rules and finalized the latest version of the guidelines based upon the input that was received at the last meeting.

Judge Olson recounted that the statewide fee guidelines as contained in Appendix A to the Proposed Amendments to the Rules of Probate Procedure was approved at the March 25 committee meeting, with a direction to workgroup 3 to include the Myers/Donahoe proposal as a point of reference in the fee guidelines. Judge Olson directed the committee to the latest version of the Proposed Amendments and explained that part of the Myers/Donahoe proposal is the proposed rules and part included in paragraph G as a point of reference for how a judge would use the calculation that comes up in proposed Rule 17.4.

Judge Olson pointed out that the proposals are the product of the Blueprint previously proposed or to the extent modified by legislation previously approved where the committee had some "follow-on" input. In drafting these proposed amendments, Judge Olson noted that the workgroup did not try to institute new policy discussions but rather to implement in rules the policy decisions that had already been made by the committee, Arizona Judicial Council ("AJC") or the chief justice.

Judge Olson moved that Judge Timmer have final numbering authority in such that she can continue to receive input as to where these proposed rules are best placed and what their proposed numbers should be. There being no objection, the motion passed.

Rule 17(H) -- Judge Olson explained that this provision requires the disclosure of the basis for fees, if the person expects the estate to pay those fees.

Judge Timmer pointed out a possible inconsistency in paragraph H and the Arizona Code of Judicial Administration ("ACJA") proposal recently finalized by Nancy Swetnam. Paragraph H seems to give authority to change the rates contingent upon thirty days' notice to the parties, whereas the AJCA proposal provides that only those rates posted on the AOC website may be charged with any changes to the rate schedule made twice a year. Discussion ensued.

Judge Olson summarized that the first sentence in paragraph H should indicate a "person or entity who intends to be compensated." Jay Polk pointed out that Arizona Revised Statutes section 14-1201, the word "person" is defined to mean an "individual or an organization." The second issue is that the last sentence should indicate verbiage such as "unless otherwise required by law or regulation." There was no objection to the inclusion of the limiting language.

Jay Polk suggested that paragraph H be made a part of Rule 30, which addresses specific procedures in guardianships and conservatorships, and that it specifically track the language of SB 1499 with respect to who receives the notice, specifically replace the "interested persons" language with "all persons entitled to notice pursuant to sections 14-5309 and 14-5405." Mr. Polk pointed out that, when drafting a common definition, the committee should keep in mind that different groups of interested parties would be entitled to receive notice at different times throughout the probate case.

Proposed Rule 17.1 – Prudent Management of Costs. Judge Olson explained that proposed Rule 17.1 is consistent with one of the statutory proposals previously approved by the committee. Judge Olson related that this proposed rule is in the version of SB 1499 as amended that included the court's amendments and has also been placed in HB 2424 substantially . Judge Olson stated that minimal changes, if any, were made from the prior statutory language. Nancy Swetnam noted that the ACJA proposals use the word "shall," whereas these proposed rules use the word "must." Judge Olson asked for the committee's preference on the use of either word. Hearing no objection, the committee agreed to the substitution of "shall" for "must" in (1), (2), and (3).

Jay Polk suggested that Rule 17 be renumbered as Rule 10.1. Judge Olson agreed and asked if there were any objections. Hearing none, Rule 17.1 will be renumbered as Rule 10.1.

Proposed Rule 17.2 – Good Faith Estimate. Judge Olson reviewed that this proposal was basically the embodiment of the Myers/Donahoe plan and the filtering that occurred prior to the ultimate SB 1499 language that was submitted to the legislature. Judge Olson reported that workgroup 3 made a few changes from the last version, including the addition of a definition for "discretionary care." Judge Olson clarified that this amendment is based on the information that is reasonably known to the petitioner, excluding medical costs and taxes.

Jay Polk voiced his concern that the good faith estimate would create a burden, particularly on the family members. Mr. Polk commented that the costs of housing, care for the ward and discretionary costs are all costs that remain the same and the focus should be on the estimate of fees that are unique to the case (conservator fees, attorneys' fees, etc.). Judge Mroz responded that the goal of the estimate is transparency in both professional fees and as an educational tool for the lay guardian and conservator.

Judge Timmer suggested that the committee recommend that the AJC ask one county to use this rule in a pilot project and related that there have been discussions with Maricopa County to use this rule as a pilot project in response to Jay's well-taken concern. Judge Myers agreed.

Committee members expressed opposition to making any final recommendations on policy issues at this meeting and instead focus on pointing out issues for future clarification. Judge Olson asked if there were any further comments on Rule 17.2.

Judge Myers moved that the committee adopt Rule 17.2 in principle subject to editing by the Chair. Judge Harrington seconded. There being no further discussion, the motion passed with one member expressing an objection.

Rule 17.3 – Financial Order. Judge Olson summarized that Rule 17.3 provides the procedure for using the estimate and/or the budget. Rule 17.3 creates the default requirement for a budget unless as set forth in Rule 30.1, a judicial officer orders the limitation of expenditures pursuant to the estimate or some other order. Subsection (b) provides that the court has the authority to discharge the conservator's attorney if the costs exceed the probable benefit. No comments or concerns were noted.

Rule 17.4 – Sustainability of Conservatorship. Judge Olson informed the committee that Rule 17.4 was the workgroup's effort to include the Myers/Donahoe Plan in the probate rules and therefore be available as a resource to come into the guidelines and into the proposed Form 5. Judge Olson noted that the key here that is embraced is the underlying concept of there being an understanding what the expenses, assets and the depletion rate are and whether or not it can sustain the protected person's lifetime. And, Judge Olson noted that if that is not the case, then there is also an alternative to set up a standardized calculation to recognize that the court is asking the conservator to make a good faith estimate and to trigger a disclosure requirement so that if this is an estate that is not expected to last the duration of the lifetime that that issue will be brought to the court's attention.

Judge Olson then turned to an explanation of each subsection:

Subsection A requires disclosure if the annual expenses exceed the income. If the protected person's estate assets are insufficient to sustain the conservatorship during the projected lifespan of the person, the conservator must disclose an alternative plan. This would allow the judicial officer to change the course of action to a plan which would be sufficient to sustain the conservatorship.

Subsection B provides that the information required by Rule 17.4 is to be in the form of a good faith estimate based upon the information that is reasonably available to the conservator and that this information may be considered by the judicial officer when entering orders.

Subsection C provides that the conservator is required to disclose the information required by Rule 17.4, including the conservator's assumptions and calculations, at the time of filing the inventory and appraisement, which is 60 to 90 days after filing the initial petition. Disclosure would continue on an ongoing annual basis at the time the annual accounting is filed, which would give the judicial officer an update on whether the conservator still appears to be sustainable as more time passes and more information becomes known, etc.

Subsection D sets out the equation used to determine whether an estate is deemed sustainable. Judge Olson described how the calculations would be used to develop an appropriate plan based on the protected person's needs and the resources that are available.

Judge Olson recounted that Rule 17.4 addresses transparency of an estate, ensures that all interested parties receive proper disclosure, and that all parties concerned understand what the plan is and asked if there was any opposition to Rule 17.4 as currently written. No comments were received.

The committee decided to approach the review of the proposed rules by using a "straw poll" method which will provided direction for future detailed consideration once the committee members have had an opportunity to digest the different proposals and decide whether they should be re-worked or deleted.

Rule 19– Appointment of Attorney, Medical Professional, and Investigator. Judge Olson explained that subsection B provides that a person who seeks the appointment of a guardian or conservator will not nominate a specific attorney to represent the proposed ward unless that attorney has an existing or prior attorney/client relationship with that person.

Judge Mackey voiced his concern that the way this subsection is written it suggests that the party who is filing the petition cannot ever nominate a person under any circumstances unless it fits within this rule, unless there was a prior attorney/client relationship between the protected person and that attorney. Judge Mackey stated that, although he agreed with limiting the group from which a judge can make the nomination, the smaller counties the courts rely on the petitioner to make a nomination because those courts may not have a roster of attorneys to appoint or possibly not have any attorneys available who would qualify under this rule. Judge Mackey would like the workgroup to further review the language in light of the problems that it would create for the smaller counties.

Judge Olson commented that this is a policy decision for this committee to recommend on; one of the issues discussed and debated at the workgroup level was that one of the criticisms that these relationships are too interwoven and that these relationships are in some way impeding the ability of people to object. Discussion followed.

A committee member suggested inserting an exception such as "in those counties where the court maintains a roster for court-appointed counsel."

Judge Timmer commented that the committee has received quite a few public comments about this issue and recounted that this proposal was in the final version of the Blueprint that was previously approved. Judge Timmer did not recall a discussion about this exact issue, however, and suggested that the workgroup review this subsection more thoroughly. Additionally, Judge Timmer suggested a survey of the presiding judges who do not use a roster what problems this will create practically and whether the committee should then entertain a motion for the exception as described above to be inserted.

Judge Olson briefly explained that subsection C provides that an attorney shall not be appointed, accept an appointment or remain appointed as an attorney for the ward or protected person if they have an existing attorney/client relationship with the fiduciary; the concept being that it was a conflict for two cases to be called and in one case the attorney to be arguing for the fees are reasonable and then next case be arguing that those same fees are not reasonable.

Next, Judge Olson explained that subsection E provides a limitation that an investigator is not to benefit from his role as an investigator and then becoming the fiduciary, the exception being a public fiduciary.

The committee did not have any comments on paragraphs C or E. No additional comments were received on Rule 19.

Rule 25, Paragraph E – Judge Olson explained that under this provision, a person who is entitled to receive a copy of the annual accounting, may apply by written notice to receive a copy of the billing statements of the conservator, the conservator's attorney and/or other financial records of the protected person, unless otherwise ordered by the court. The person entitled to receive copies must pay reasonable copying costs and shall not release the records to anyone other than the person's own attorney. The conservator is allowed to redact confidential data, such as social security and account numbers. Additionally, the conservator should comply as soon as practicable, but no later than 30 days after receiving the written request. Judge Olson further noted that the conservator's compliance with this request would be counted as billable time.

The committee discussed a possible change in the language to avoid a possible conflict with provisions where the fiduciary is obligated to redact information, and whether records requests should only be limited to conservators. Jay Polk pointed out that this issue is addressed in A.R.S § 14-5419(B), which specifically provides that a certain class of people are entitled to inspect the records of the conservatorship. The committee will revisit both this issue and a timing issue at a later date.

Jay Polk spoke to the committee regarding paragraphs B through D (Order to Guardian, Order to Conservator, Order to Guardian and Conservator). Mr. Polk explained that the current order to personal representative requires the personal representative to provide a copy of that order to the heirs and devisees, whereas the order to guardian, order to conservator and order to guardian and conservator does not require that that order be provided to anyone. Mr. Polk suggests that the workgroup amend paragraphs B through D to require that a copy of those orders be provided to the persons entitled to notice of the original petition. There were no comments or concerns noted to this proposal.

Rule 29 – Alternative Dispute Resolution. Judge Olson summarized that this rule provides that the court may order alternative dispute resolution, including compulsory arbitration pursuant to Arizona Rules of Civil Procedure 72 through 76. No comments or concerns were noted.

Rule 29.1 – Written Findings on Appointment. – Judge Olson explained that, following a contested hearing on the appointment of a guardian or conservator, the court shall make a record of its reasons for passing over a person with higher priority and appointing a person with a lower priority, if the findings are requested in writing within 10 days following the appointment.

Discussion ensued on whether the findings of fact should be requested prior to the hearing, within a certain time after the hearing, or as an automatic requirement that the judicial officer put reasons on the record when passing over a person with higher priority.

Denise Shepard suggested a change in the language to include the word "permanent hearing" because many times in a temporary situation there is a reason for appointing a person with a lower priority, i.e., an emergency situation where a family member was unable to deal with the emergency, but could on the permanent petition they could handle the situation.

Judge Olson summarized the committee's suggested re-wording of Rule 29.1 as "following a contested hearing on the appointment of a permanent guardian or conservator, the court shall make a record of its reasons for passing over a person with higher priority and appointing a person with lower priority." No further comments were received and the committee agreed with the proposed change.

Introduction to Rule 29.2
Chief Judge Ann A. Scott Timmer

Judge Timmer informed the committee that the first version of Rule 29.2, dealing with fee-shifting and vexations conduct, was proposed in SB 1499 and is almost word for word from what the committee proposed in SB 1499. The alternate version of Rule 29.2, which was drafted by Judge Timmer, shortens the first version and changes the vexatious conduct remedy quite a bit. Judge Timmer voiced her concerns that the rule, as is presently written, may be unconstitutional, and therefore warranted further research and thought. Judge Timmer also did not agree with the vexations conduct provision in that it entirely precludes a person from participating in proceedings, rather than screens them. Additionally, Judge Timmer commented

that she is not convinced that the committee has the authority in rulemaking power to vary from the American rule of awarding fees, i.e., to have a substantive fee award provision in the rules.

LUNCH 12:05 – 12:25

Workgroup 3 – Fee Guidelines/Fee Awards and Fee Dispute Resolution
Judge Robert Carter Olson, Chair

Rule 29.2 – Remedies for Unreasonable Conduct and Vexatious Conduct (version one). Judge Olson summarized that the workgroup somewhat revised the fee-shifting statute in attempt to put it into a rule format and in doing so tried not to change anything that had been previously approved by the committee. Additionally, Judge Olson noted other concerns, one being whether it should be in the form of a rule or statute. Judge Olson stated that it was drafted and approved by the committee for inclusion in a statute and recounted that it is in SB 1499 but not in HB 2424.

Jay Polk noted that the vexations conduct section, which grants the court authority to declare that a person is no longer a party to the proceeding, had been removed from HB 2424 because of negative comments the legislature had received. Mr. Polk noted that the actual fee-shifting for unreasonable conduct is included in HB 2424.

Judge Olson suggested that the committee focus on a general discussion of Rule 29.2, and whether it should be in the form of a rule or statute. Judge Olson recalled Judge Timmer's earlier comment that the basic rule is the award of attorneys' fees needs to come out of legislation and that he perceives it in terms of a Rule 11 provision, which authorizes the award of attorneys' fees, although it's more a sanction that is set in accordance with the amount of attorneys' fees.

The committee focused on the importance of a procedure by which the court could address those cases involving a person who causes a large amount of fees to be incurred by the ward, thereby wasting the ward's funds. Judge Harrington noted that the language of Rule 29.2 addressed this critically important issue of wasting the ward's money by unnecessary fees being incurred. In response to Judge Olson's question, Judge Harrington stated that Rule 11 did not address a lot of situations in cases before him.

Jay Polk recounted that he was responsible for the original draft of this proposal and commented that in regard to the fee-shifting aspect, if Rule 29.2 was truly a sanction statute like Rule 11, the court would have the inherent power to force the person to pay the fees. He reminded the committee that the original proposal, which was approved by the AJC, included a clarification that the sanctions were not meant to be punitive as much as it was intended to reimburse the ward. Mr. Polk presented an analogy to illustrate his position that Rule 29.2 is a statutory standing issue, not a constitutional right: he would not have the legal right to show up and participate in his parents' divorce proceedings and would not have a constitutional right to participate in the guardianship/conservatorship proceedings for his parents. Mr. Polk explained that the legislature has created standing by stating that the petitioner must give notice to that person.

Judge Timmer responded that, under Mr. Polk's example, although a person does not have a constitutional or statutory right to participate, that person has the right to ask for permission to participate and Rule 29.2 as presently written prevents a person from even asking to participate in a proceeding. Judge Timmer stated that a judge presently has the ability to declare a person a vexatious litigant by having the presiding judge review the situation and rule whether or not to allow the person to participate in proceedings. Further, Judge Timmer noted that by employing this screening a person would not be prevented from asking the question, in turn not depriving the person of his constitutional right to access to the courts. Finally, Judge Timmer pointed out that Rule 29.2 addresses the issue of multiple telephone calls by allowing a court to enter an injunction specifically enjoining the person absent further order of the court.

Judge Mackey related to the committee his concern that if a person's access to the courts were entirely cut off, there could be a situation where that same person's input on a matter involving the case might be needed in the future. Further, Judge Mackey noted that the probate rules were specifically written to incorporate the civil rules that were not otherwise covered, and that Rule 11 has been utilized in probate proceedings. Because Rule 11 and other fee statutes are available, Judge Mackey stated that he is not in favor of these proposals either statutorily or by rule.

The committee then turned to the issue of possible due process implications. In reference to Jay Polk's comment that a fiduciary would no longer be required to give notice to a person who had been precluded from attending proceedings, Judge Mackey brought up the possibility of due process issues.

Judge Olson suggested incorporating some of the Rule 11 language to authorize the court to enter an appropriate sanction, such as reimbursement of reasonable expenses, and perhaps include a provision that other parties need not respond to those pleadings unless directed by the court to do so, thereby allowing the court to do some filtering function. A brief discussion followed. A committee member instead suggested creating a rule specifically written for probate proceedings to control what the court is supposed to do: protect the ward and the protected person by giving the courts a variety of "menu options" to deal with persons who continue to cause problems.

Judge Timmer directed the committee's attention to the alternate version of Rule 29.2(C) which states that the court may do either or both of the following: (1) ordering that the person engaged in vexatious conduct obtain the court's permission to file future pleadings, etc., in the probate matter or other matters, or (2) ordering that a fiduciary, fiduciary's attorney, court-appointed attorney, etc., does not have to respond to future requests for information made by that person unless required by subsequent court order. Judge Timmer noted that she thinks this provision accomplishes the committee's wishes, including lessening the fees but not entirely precluding a person from asking permission to attend hearings.

The committee then turned to a discussion on the inherent authority of the court in these situations.

Judge Olson related to an earlier discussion on the American rule and being able to award fees where there is not a legislative grant; the only basis to do so is through sanctions and posed the following question for the committee's consideration: if the committee does not think that it has the authority to award fees under rule without a legislative grant, should the proposal go forward with the focus on vexatious language and remedies along the lines that Judge Timmer proposed in her alternate version and removing the (A) and (B) sections of the proposal concerning the award of fees.

Jay Polk suggested expanding on the definition of vexatious in the alternate version to include language to the effect that that conduct includes not litigating for the best interests of the ward with certain exceptions (such as a creditor).

The committee's consensus was to table this discussion for the future to await the outcome of the legislature.

Rule 29.3 – Repetitive Filings; Summary Denial – This provision makes clear that the court has the authority to summarily deny a motion or petition filed on the same or substantially similar matter by a person within 12 months of the original matter.

Rule 30 – Guardianships/Conservatorships – Specific Procedures. Judge Olson reported the workgroup proposed a few changes, specifically clarifying that an inventory includes assets and liabilities. Additionally, the workgroup struck references to "conservator's accountings" as it refers to "conservator's account" so the same terminology appears in both the rule and statutes. Additionally, Judge Olson pointed out the addition of paragraph (G), which references Form 5.

Rule 30.1 – Conservatorship Budget -- Judge Olson recounted that this has been largely lifted from the proposed draft of SB 1499 as amended by the legislature and informed the committee that the phrase "deemed approval of the budget" has been removed, thereby now mirroring the existing budgetary language in SB 1499. Subparagraph F authorizes that if the court prefers to do so, it may order that a proposed budget be approved absent any objection. Judge Olson noted that there is a question of whether or not this would be acceptable to the AOC in light of the ongoing debates on estimates versus budgets, what would have to be actually approved versus deemed approved versus having expenditure limitation orders, etc.

Rule 33 – Compensation for Fiduciaries and Attorney's Fees. Judge Olson recounted that the way subparagraph E was written basically authorizes the superior court in each county to adopt its own fee guidelines since one of the things we are tasked with as a committee is to come up with proposed statewide fee guidelines. Judge Olson recounted that when the statewide probate rules were adopted each of the counties were required to abrogate their local rules on probate and therefore, if there are going to be statewide fee guidelines imposed, those guidelines should apply to all. Judge Olson noted that Rule 33 references Appendix A, which is the fee guidelines.

Paragraph (G) – Judge Olson explained that this provision establishes a claims deadline pertaining to the submission of fees and compensation

Form 5 – This form has been put into a similar format to the existing Forms 1 through 4 which are presently included in the probate rules. Judge Olson explained that the section entitled "Summary Report" is largely equivalent to what was in the previous version and related that one of the workgroup's concerns was to keep the categories the same between the estimate system and the account and budget systems so that those numbers would flow through. Judge Olson then explained if the conservatorship is not sustainable for the protected person's lifespan, the conservator will report on page 3 the alternative objective of the conservatorship, such as a plan for transition to public assistance or a minor conservatorship or whatever and then the required attachments: the transaction log, similar to what is effectively provided now, and an updated inventory.

The committee had no comments on Form 5.

Proposed Amendment to Arizona Code of Judicial Administration § 702: Fiduciaries

Paragraph D(4)(d) – Responsibilities of Division Staff. Nancy Swetnam explained that the amendment to this section, which is subsection (d), posting of fee schedules on the AOC website, in addition to the licensure information, reports of compliance audits, informal or formal disciplinary action, and a link to the fiduciary's website.

Denise Shepherd commented that paragraph 4 conflicts with the rule discussed by the committee earlier this a.m. and suggested the insertion of "absent court order." Nancy Swetnam agreed and commented that this is a first draft which would have to flow with the other proposed rules.

Paragraph F(10) – Fee Schedule and Fiduciary Information. Ms. Swetnam explained that this addresses the fiduciary's responsibility to ensure that the information posted on the website is accurate. This paragraph additionally provides that the fiduciary is required to complete and submit Form 5, which will subsequently be used by staff to post the information to the website. In response to a question by Catherine Robbins, Ms. Swetnam commented that the exact information to be included in Form 5 would have to conform with the outcome of legislation on the rules and guidelines.

Workgroup 1 – Minor to Adult Guardianship
Judge David Mackey, Chair

Judge Mackey updated the committee on the progress of his workgroup since the last committee meeting.

Rule 10(A)(1). Responsibility to Court – Judge Mackey explained that this proposed change would provide that it is an attorney's obligation to reduce expenses by allowing the fiduciary to take action without the attorney, where appropriate. Judge Mackey further explained that this proposed change would also clarify that unless the fiduciary's presence is required, the

attorney would be allowed to take action. Hearing no opposition, Judge Mackey stated that the workgroup will continue to work on the specific language for this proposed change.

Rule 10(A)(3). Appointment of Representative – Judge Mackey reported that the workgroup attempted to take some of the Rules of Family Law Procedure that now refer to a guardian ad litem as a "best interests attorney" and incorporate some of those provisions into this rule.

Discussion ensued regarding whether to change the term "guardian ad litem" to "best interests attorney." A committee member pointed out that by changing the language, it may help distinguish between a court appointed attorney, whose responsibility is to the wishes of the ward, and the best interests attorney, who would represent the best interests and not necessarily taking direction from the ward. Hearing no opposition, the "best interests attorney" language will be substituted.

Rule 10(A)(3)(a) and (b) – Judge Mackey presented a brief summary of these subsections.

Rule 10(A)(3)(c) – Judge Mackey explained that this provision refers to not appointing a best interests attorney in place of a court-appointed attorney, specifically that subsection (c) recognizes that if there is a legal requirement for a court-appointed attorney, the court must do so. Judge Mackey further pointed out that subsection (c) provides a process for that court-appointed counsel seeking approval to be now classified as a best interests attorney and limits that to a situation where they can show by clear and convincing evidence that a person is unable to express their wishes or advocate for – or that the attorney is unable to advocate for that person's best interests. Judge Mackey noted that the workgroup continues to work on this language as well, and that this concept has not been fully vetted with the group yet.

Rule 10(A)(3)(d) through (h) – Judge Mackey asked the committee to carefully review these subsections and provide comments and feedback to Judge Timmer and/or him.

Judge Mackey recounted that subsection (j) was a fee-allocating provision in the Rules of Family Law Procedure in order to be consistent with other Rules of Family Law Procedure incorporated into other subsections.

Judge Mackey then turned to subsection (k), which sets forth the actions the best interests attorney needs to take prior to the expiration of his appointment, either applying to withdraw setting forth why continued representation is no longer necessary and informing the court of any issues pending; or, the best interests attorney would file a motion to continue the duration of his appointment.

Judge Mackey moved on to Rule 10(C) and reported that subsections (C)(1)(a) clarifies that a fiduciary is allowed to sign documents to be filed with the court even if the fiduciary is represented by counsel; subsection (b) would pertain to the attorney's ability to reduce the

fiduciary fees by having counsel appear. Judge Mackey reminded the committee that this is a rough draft and the workgroup would like feedback and direction.

Judge Olson questioned whether, if the fiduciary is performing some of these "quasi-attorney" actions, would opposing counsel be allowed to communicate directly with the fiduciary if they are represented by counsel and asked if the ability to communicate directly with a represented party needs to be revisited. Judge Mackey responded that the workgroup had not yet had an opportunity to address that issue and will do so.

Denise Shepherd pointed out that the types of pleadings the fiduciaries would be able to sign need to be very clearly defined so as to avoid any unauthorized practice of law. Judge Mackey asked that Ms. Shepherd provide him with a list of suggested pleadings. Nancy Swetnam responded that ACJA § 7-208 provides that certified legal document preparers can practice law in a very limited way and that ACJA § 7-202 provides that licensed fiduciaries who are licensed as a legal document preparer have the same ability.

Diana Clarke commented that as a member of workgroup 3 she had proposed a provision that would allow fiduciaries to sign certain documents and thought instead of in a statute as originally proposed, to make changes to the current rules that would allow that in the same way that the legal document preparers are allowed to do that and noted that the workgroup continues to pursue that. Judge Mackey requested a copy.

Jay Polk pointed out that the proposed rule did not set forth at which point in a guardianship/conservatorship case appointment of a best interests attorney would be appropriate, i.e., a situation where a guardian ad litem is appointed before the judicial officer makes the finding of incapacity. Judge Mackey requested that Mr. Polk provide him with suggestions for language and noted that the domestic relations rules did not address this issue either.

Workgroup 2,
Judge Charles Harrington, Chair

Before Judge Harrington left the meeting, he reviewed that the committee had previously requested that certain issues be followed up on and that members of that sub-workgroup has come up with a comprehensive analysis and review and recommendations of the issues that you asked to be addressed. Judge Harrington commended the members of the committee and his workgroup for its arduous work on all issues.

Catherine Robbins updated the committee in Judge Harrington's stead.

Ms. Robbins asked for the committee's direction on whether her sub-workgroup should focus on adult post appointment monitoring or whether the workgroup's charge was to broaden it to take in all case types for all types of potential problems and what the cost of that would be.

A brief discussion ensued, including a short discussion on the use of the risk assessment tool as being a good avenue for the judge to be provided with additional information and also a

way of triaging a case in terms of the amount of risk. Judge Mackey agreed with the idea of a triage dealing with all different potential problem areas in a full spectrum of cases.

CALL TO THE PUBLIC

There was no public comment.

NEXT MEETING: Friday, May 6, 2011, 10:00 a.m., Room 109.

Motion to Adjourn: Judge Mackey
Seconded: Diana Clarke
Passed